

**A.M. v Holy Resurrection Greek Orthodox Church of
Brookville, N.Y.**

2020 NY Slip Op 30535(U)

February 24, 2020

Supreme Court, New York County

Docket Number: 156132/16

Judge: Sherry Klein Heitler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30**

-----X
A.M. and E.M., both minors, by and through their parents
and natural guardians, EFTIHIA MIHOS and EVANGELOS
MIHOS,

Index No. 156132/16
Motion Sequence 10/11

DECISION & ORDER

Plaintiffs,

-against-

**HOLY RESURRECTION GREEK ORTHODOX
CHURCH OF BROOKVILLE, NEW YORK aka
GREEK ORTHODOX CHURCH OF THE HOLY
RESURRECTION, et al.,**

Defendants.

-----X
SHERRY KLEIN HEITLER, J.S.C.

Motion Sequences 10 and 11 are consolidated for disposition.

Plaintiffs A.M. and E.M., both of whom are minors, allege that non-party P.K., who is also a minor, sexually assaulted A.M. inside a church operated by defendant Holy Resurrection Greek Orthodox Church of Brookville (Holy Resurrection). The subject incident allegedly occurred on May 10, 2015 following church services. Defendant Father Demetrios Kehagias, who at the time was affiliated with Holy Resurrection as a substitute priest, is also P.K.'s father.

Plaintiffs sued Holy Resurrection, the Greek Orthodox Archdiocese of America (Archdiocese), Father Kehagias, and Archbishop Demetrios Trakatellis (collectively, Defendants). The complaint alleges several causes of action sounding in common-law negligence, negligent supervision, failure to warn, and negligent infliction of emotional distress. Essentially, Plaintiffs allege that the Defendants negligently allowed P.K. to be on church grounds when they knew or should have known that P.K. had a propensity for sexual violence.

The details of the incident need not be set forth in detail as there is no dispute that P.K. perpetrated an assault of a sexual nature.¹ Briefly, A.M. and E.M.'s parents were speaking with defendant Father Demetrios Kehagias when A.M. (who was four years old at the time) wandered upstairs to the sanctuary with his sister, E.M (who was six years old at the time). A.M.'s father, Evangelos Mihos, testified² that he noticed something was amiss when A.M. came downstairs from the sanctuary and looked "disheveled, sweating. His shirt was out of his pants. His pants were unbuttoned and unzipped and falling down." (Mihos Deposition p. 33). At that point Father Kehagias "basically [said], 'I know what happened. I know what's going on. I'm going to kill him'" (*id.* at 34). P.K., who was 13 years old at the time of the incident and 17 when he was deposed³, admitted that there had in fact been an incident of a sexual nature involving A.M. on the date in question (P.K. Deposition pp. 16-17). He testified that he had "urges or temptations to do things that were wrong", but that the incident with A.M. was "the first time and the only time" he acted upon them (*id.* at 20-21).

Father Kehagias explained⁴ that when he spoke in front of A.M.'s father - "I know what happened. I know what's going on. I'm going to kill him" - he did not think anything of a sexual nature had transpired between P.K. and A.M. He said he only learned the truth about the incident after reading the police report from the incident. Father Kehagias explained that his concern arose from a stroke he suffered that kept him in the hospital and away from his family for several months. As a result P.K.'s mother stopped taking him to boy scout and several other extracurricular activities so that he could assist her at home. According to Father Kehagias, P.K.'s separation from

¹ This incident was the subject of a Kings County Family Court proceeding, which resulted in a juvenile delinquency adjudication.

² Archdiocese, Exhibit F (Mihos Deposition).

³ Archdiocese, Exhibit H (P.K. Deposition).

⁴ Archdiocese, Exhibit I (Kehagias Deposition).

him and from his friends led him to have “strange social interactions” (*id.* at 12-13). Father Kehagias’ concerns also related to a November 10, 2014 incident at P.K.’s school where another student followed P.K. into the bathroom. According to Father Kehagias the school investigated the incident and found no fault on the side of either child (*id.* at 16-17). Department of Education records suggest otherwise, i.e., that the incident was non-consensual, instigated by P.K., and was of a sexual nature (See Plaintiff’s exhibit D).

Father Kehagias testified that he did not inform his supervisor, Bishop Andonios, of the school incident until after the incident involving A.M. was brought to the attention of church officials (Kehagias Deposition, pp. 57-58):

- Q. Why didn’t you tell him about the school incident?
- A. That didn’t involve the church.
- Q. If I understand your position, it’s that the bishop had the right to know about incidents that occurred in the church, but not outside of the church?
- A. Correct.
- Q. How did the bishop take that?
- A. I don’t believe he took it well.
- Q. What did he do as a result?
- A. As the email he sent would indicate, he said that until further notice, I did not have permission to serve.
- Q. Did you ever tell the bishop about the school incident?
- A. No.
- Q. After the school incident, but before May 10, 2015, did you take any precautions with regard to P.K. around other children?
- A. There was no need to take precaution.

Bishop Andonios confirmed⁵ that he was not aware of any prior incidents involving P.K. and that he recommended parishes not use Father Kehagias as a priest until the incident had been more fully investigated (Andonios Deposition p. 75, 77-78):

⁵ Archdiocese, Exhibit K (Andonios Deposition).

Q. And do you recall did there come a time when you exercised that authority and told father Kehagias you would not allow him to serve as a substitute priest?

A. Yes, after the incident in Brookville. . . .

Q. Okay. And were you motivated to protect the safety of your parishioners in the church?

A. It would be normal protocol in light of what happened until we knew more information to prohibit the father from serving in any community until an investigation had been completed and there was knowledge of what had transpired.

Q. Were you aware that Father Kehagias was involved in an incident with his son PK?

A. I had no basis of knowing that. It had never been told to me.

Q. Okay. Did you have a concern that PK may have sexually assaulted kids in other parishes?

A. I have no reason to have believed that, sir.

Ms. Eirini Haralambidis, Holy Resurrections' office manager, testified⁶ that from October 2014 to July 2015 the church did not have a full-time priest. When a priest was needed for church services of any kind, she would call the Archdiocese whose staff maintained a list of available substitute priests. Holy Resurrection had used Father Kehagias as a substitute priest without incident for about 10 months prior to the incident involving P.K. and A.M. and believed that he was otherwise unemployed when he was not acting as a substitute (Haralambidis Deposition, pp. 7-8, 13). Father Kehagias testified that he had been acting as a substitute priest since 2010 when he lost his full-time position in the parish located in Island Park, New York. When acting as substitute priest he did not enter into an employment contract, received 1099s as opposed to a W-2, and was generally not invited to parish council meetings. He was also paid directly by the parish as opposed to the archdiocese (Kehagias Deposition p. 65-68).

James Xanthos, president of Holy Resurrection's parish council, was also deposed in this case.⁷ He confirmed that Father Kehagias served as a substitute priest for Holy Resurrection

⁶ Holy Resurrection, exhibit F (Haralambidis Deposition).

⁷ Holy Resurrection, exhibit G (Xanthos Deposition).

numerous times between June 2014 and May 10, 2015, the date of the incident. From his perspective, Father Kehagias' job was very limited (Xanthos Deposition p. 19):

A. ... I want to make it very clear that from our perspective Father Kehagias was simply there to perform a service. And other than that there was really no expectation of any relationship building. Now, if any parishioner had a question or wanted to speak to him about a religious matter certainly they could take that up with Father Kehagias on a private manner. But from our perspective it was simply to come in, perform the liturgy and then go about his way.

Mr. Xanthos was not aware of any prior incidents involving P.K. and did not even know Father Kehagias had a son (*id.* at 23, 36).

Plaintiffs served three expert witness disclosures in this case. Two of them relate to Plaintiff's claimed injuries. The third expert, Patrick Michael Doyle, is purported to be an expert on the structure and operation of religious institutions.⁸ In his affidavit he discusses the structure of the Greek Orthodox Church and Father Kehagias' duty to protect parishioners from instances of sexual abuse (Doyle Affidavit ¶¶ 9-11):

A priest of the Archdiocese has a fundamental obligation to protect children in the church from sexual abuse or assault. This obligation does not depend on whether he is a regular parish priest or a temporary or substitute priest . . . this requirement takes on particular significance when a substitute priest conducts Sunday mass, as he would likely be the only clergy member on location and the only person who could be expected to protect children in the church from a risk of sexual harm.

In short, Father Kehagias had a duty to prevent his son, whom he knew presented a risk of sexual misconduct to children, from having unsupervised access to other children on church grounds . . .

Before taking his son with him to the Sunday Services he was conducting, given his knowledge, Father Kehagias had a duty to inform and obtain permission from the Archdiocese and the parish council of the Church . . . Father Kehagias did neither of these things.

The Defendants, other than Father Kehagias, move for summary judgment dismissing all causes of action against them. Defendants argue, among other things: (1) they had no notice of P.K.'s propensities; (2) they cannot be liable under a *respondeat superior* theory because Father

⁸ Plaintiff's exhibit A (Doyle Affidavit).

Kehagias was not an employee of Holy Resurrection or the Archdiocese, nor could he be deemed to have been acting within the scope of any such employment; and (3) they did not negligently hire Father Kehagias, negligently supervise him, or negligently fail to warn parishioners about P.K. The Archdiocese separately argues that it did not own the premises where the alleged incident took place and had no notice of any dangerous condition. Holy Resurrection concedes that it owned the property at issue but, like the Archdiocese, claims it had no notice of any dangerous condition.

DISCUSSION

“Summary judgment is a drastic remedy, to be granted only where the moving party has ‘tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact’ and then only if, upon the moving party’s meeting of this burden, the non-moving party fails ‘to establish the existence of material issues of fact which require a trial of the action.’” *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); see also *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). “[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact.” *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); see also *Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

These motions presents several main issues: (1) whether Father Kehagias was an employee of Holy Resurrection and/or the Archdiocese; (2) whether Father Kehagias was acting within the scope of such alleged employment; and (3) whether Holy Resurrection or the Archdiocese knew or

should have known about P.K.'s alleged propensities such that they can be held liable for his actions. The court will address the agency/vicarious liability issues first.

Vicarious Liability

“Under the doctrine of respondeat superior, an employer may be held vicariously liable for the torts committed by an employee who is acting within the scope of employment.” *Galasso, Langione & Botter, LLP v Galasso*, 2019 NY App. Div. LEXIS 7768, *14 (2d Dept 2019) (citing *Riviello v Waldron*, 47 NY2d 297, 304 (1979)). “While such vicarious liability does not arise from acts that are committed for the employee’s personal motives unrelated to the furtherance of the employer’s business . . . those acts which the employer could reasonably have foreseen are within the scope of the employment and thus give rise to liability under the doctrine of respondeat superior . . . even where those acts constitute an intentional tort or a crime.” *Holmes v Gary Goldberg & Co., Inc.*, 40 AD3d 1033, 1034 (2d Dept 2007); see also *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 (1999); *Bowman v State*, 10 AD3d 315, 316 (1st Dept 2004).

“Conversely, as a general rule, an employer may not be held liable for an independent contractor’s negligent acts.” *Begley v City of New York*, 111 AD3d 5, 28 (2013). “The rationale underlying this rule is that ‘one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor.’” *Id.* (quoting *Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]). Control over the “means and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability.” *Calandrino v Town of Babylon*, 95 AD3d 1054, 1055 (2d Dept 2012). Such determinations are generally questions of fact to be resolved by a jury. *Anikushina v Moodie*, 58 AD3d 501, 504 (1st Dept 2009).

The Archdiocese asserts that it did not “employ” Father Kehagias at the time of the incident. In taking this position, the Archdiocese relies on the fact that he was without a permanent

assignment since 2010, did not receive health or other benefits since 2010, and received checks directly from the local parishes whenever he presided over a church service as a substitute. Plaintiff, in opposition, argues that the Archdiocese's control over local parishes and church assignments was pervasive enough to establish an agency relationship. For example, scheduling was done through the Archdiocese. The Archdiocese also had the authority to terminate a priest's assignment (as Bishop Andonios did in this case) and, while each parish ultimately paid for Father Kehagias' services, it was the Archdiocese that had the authority to set his salary (see Plaintiff's exhibit B). In addition to these "traditional" indicators of an employer/employee relationship, Plaintiff points out that Father Kehagias was bound to follow the Archdiocese's policies and procedurals guide as well as a "Priests Handbook," which outlined the way he was supposed to conduct himself on a day-to-day basis. Bishop Andonios also confirmed that individual parish priests had no authority to make important decisions without consulting the Archdiocese (Andonios Deposition p. 33).

Holy Resurrection takes the position that Father Kehagias was not its employee either. In this regard, Mr. Xanthos testified that the decision to assign Father Kehagias to Holy Resurrection as a substitute priest was made by the Archdiocese (Xanthos Deposition p. 37-38). Relying on this testimony, Holy Resurrection argues that Father Kehagias was "provided" to the church by the Archdiocese and, like Plaintiff, points out that Father Kehagias believed the Archbishop to be his ultimate superior (Kehagias Deposition pp. 38-39, 41):

Q. Did the archbishop determine the assignments?

A. The archbishop determined the assignment; the chancellor makes the assignments on behalf of the archbishop. . . .

Q. Who determined your compensation?

A. The archbishop, through the guidelines that they have set forward for compensation.

Q. Did you consider the archbishop to be your boss?

A. He is.

Q. You report ultimately to the archbishop?

A. I report to him and to anybody else that's under him that he instructs me to report to.

Q. Are you still a priest with the orthodox church?

A. Yes.

Q. You still report ultimately to the archbishop?

A. Yes. . . .

Q. Does the archbishop, today, still determine what churches you are to work at?

A. Yes.

Q. Does he still determine what you should be covering at those churches?

A. Yes.

Based upon these facts and circumstances, in particular the dispute about which defendant controlled Father Kehagias' work, the court cannot determine whether he was an employee or independent contractor for *respondeat superior* purposes. The existence of this factual dispute, however, does mean this case should proceed to trial, as Plaintiff must also raise an issue of fact as to whether Father Kehagias was "acting within the scope of his employment" as it relates to the May 10, 2015 incident.

In cases where an employee commits sexual abuse, courts have routinely held that such conduct falls outside the scope of the employment. *N. X. v. Cabrini Med. Ctr.*, 97 NY2d 247, 251 (2002); *Acosta-Rodriguez v City of New York*, 77 AD3d 503, 504 (1st Dept 2010); *Oswaldo D. v Rector Church Wardens & Vestrymen of Trinity Church of N.Y.*, 38 AD3d 480, 480 (1st Dept 2007); *McKay v Healthcare Underwriters Mut. Ins. Co.*, 295 AD2d 686, 687 (3d Dept 2002); *Joshua S. by Paula S. v. Casey*, 206 AD2d 839 (4th Dept 1994); *see also Wilson v Diocese of N.Y. of the Episcopal Church*, 1998 US Dist. LEXIS 2051, *15 (SDNY Feb. 23, 1998) While this case is different in that it was the priest's son rather than the priest himself who is alleged to have committed an assault, the result should be same. If courts have determined that vicarious liability does not attach to an employee who commits sexual assault, it should also be inapplicable where the person committing the assault is the employee's minor child. In other words, where the conditions

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for imposing *respondeat superior* liability upon an employee have not been met, the same can be said for the employee's family member. Applying these concepts to this case, even if Father Kehagias knew his son had a predilection for sexual violence, there is no evidence that he disclosed his concerns to Holy Resurrection and to the Archdiocese. And, by keeping this alleged knowledge to himself, he was clearly acting outside the scope of his employment. Accordingly, Plaintiff's vicarious liability claims against Holy Resurrection, the Archdiocese, and Archbishop Trakatellis are dismissed.

Direct Liability

Plaintiffs also claim that the Defendants were independently negligent. These claims sound in negligence: negligent supervision, failure to warn, premises liability, and negligent infliction of emotional distress. To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach. *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 (1st Dept 2013). While the Archdiocese argues to the contrary, the court finds that the Defendants owed Holy Resurrection's parishioners, including Plaintiffs, a duty of care. The question is whether the Defendants breached this duty of care under the circumstances.

Negligent Supervision and Failure to Warn

A necessary element of a negligent supervision cause of action is that the employer knew or should have known of the propensity for the conduct which caused the injury. *See Bumpus v New York City Tr. Auth.*, 47 Ad3d 653 (2d Dept 2008) (quoting *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997], cert denied 522 US 967 [1997]) ("A necessary element of a cause of action alleging negligent retention or negligent supervision is that the 'employer knew or should have known of the employee's propensity for the conduct which caused the injury'; *Dia CC. v Ithaca City Sch. Dist.*, 304 AD2d 955, 956 (3d Dept 2003) ("Where liability

is imposed on a school for negligent supervision due to injuries related to an individual's intentional acts, the plaintiff generally must demonstrate the school's prior knowledge or notice of the individual's propensity or likelihood to engage in such conduct, so that the individual's acts could be anticipated or were foreseeable." In cases involving sexual assault, plaintiff must show that an employer had a specific concern about an employee's propensity for violence. It is not enough to show that an employer may have had general concerns about the employee's performance or other behavior. For example, in *McBride v City of New York*, 160 AD3d 414 (1st Dept 2018), the court dismissed negligent supervision claims against the Board of Education by the parents of a minor who had been assaulted by a BOE teacher. The court held that, until the teacher's arrest, they had not received any claims about him other than for alcohol abuse, which did not constitute notice of a propensity for sexual misconduct. *Id.* at 414. In *Taylor v United Parcel Serv., Inc.*, 72 AD3d 573 (1st Dept 2010), plaintiff was assaulted by a UPS employee who was making a delivery to her apartment. Plaintiff failed to raise an issue of fact as to negligent supervision even though the employee's employment file indicated "poor behavior" by the employee, including "rudeness and inappropriate flirtation." *Id.* at 574; see also *Oswaldo D. v. Rector Church Wardens & Vestrymen of Trinity Church of N.Y.*, 38 AD3d 480, 480 (1st Dept 2007) (prior drug use not indicative of propensity for violence).

Here, there is nothing in the record to indicate that either the Archdiocese, Holy Resurrection, or Archbishop Trakatellis had or should have any concerns with Father Kehagias or with P.K., much less concerns related to a propensity for sexual violence. As soon as the Archdiocese became aware of the incident Father Kehagias was relieved of his duties and was removed from the list of eligible substitute priests. Accordingly, Plaintiffs' negligent supervision claims are without merit.

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Premises Liability and Failure to Warn

It is well settled that a landowner “must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.” *Basso v Miller*, 40 NY2d 233, 241 (1976). “The scope of [this] duty to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition.” *Cupo v Karfunkel*, 1 AD3d 48, 51 (2d Dept 2003). To be liable for failing to warn, the defendant must have notice of a condition as well as the unreasonable risk that it creates. *Herman v State*, 63 NY2d 822, 823 (1984). “To recover damages from a property owner for injuries caused by criminal acts on the premises, a plaintiff must produce evidence that the owner knew or should have known of the probability of criminal conduct by third persons that was likely to endanger the safety of those lawfully on the premises.” *Michelle K. v Stonehurst III Assoc.*, 50 AD3d 639, 639 (2d Dept 2008).

Assuming, *arguendo*,⁹ that each of the Defendants owed a duty of care to Plaintiffs, none of them knew or should have had any reason to know about P.K.’s alleged propensities. As for the Archdiocese and Archbishop Trakatellis, there is no evidence to show that they knew about P.K.’s prior incident, and thus no reason to be concerned about him attending church services. Holy Resurrection certainly knew that P.K. was on church grounds, but again had no reason to have concerns about Father Kehagias or P.K. Neither defendant could have foreseen that Father Kehagias would bring his son to church, knowing that he had a propensity for violence, and allow him to wander around church grounds unsupervised. To hold otherwise would unreasonably push the limits of foreseeability to a place that has no basis in New York law. As such, Plaintiffs’ failure to warn and premises liability claims are dismissed.

⁹ The court recognizes that Archdiocese cannot be held liable under a premises liability theory because it has no ownership interest in Holy Resurrection or the church grounds.

Negligent Infliction of Emotional Distress

A cause of action to recover damages for negligent infliction of emotional distress does not require a showing of physical injury but “must generally be premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff’s physical safety or causes the plaintiff to fear for his or her own safety.” *E.B. v Liberation Pubs.*, 7 AD3d 566, 567 (2d Dept 2004); *see also Sheila C. v Povich*, 11 AD3d 120, 130 (1st Dept 2004). A cause of action for negligent infliction of emotional distress “must be supported by allegations of conduct by the defendants “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983) (quoting Restatement [Second] of Torts § 46, Comment d). No action (or inaction) on the part of the Defendants in this case rises to the level of this burdensome standard. As such, Plaintiffs cannot sustain a claim of negligent infliction of emotional distress.

E.M.’s claims

Plaintiffs contend that E.M. witnessed the assault, but also concede that she did not suffer any physical harm. She does, however, claim to suffer from anxiety and other adverse psychological effects. But given that Defendants’ liability for this psychological harm can only be based upon a negligent infliction of emotional distress theory, and in light of the court’s finding that such a claim is without merit, E.M.’s claims must also be dismissed.

CONCLUSION

The evidence in this case suggests that Father Kehagias may have known about his son’s propensity to commit sexual assault. Critical to these motions, however, he kept this knowledge to himself. Such actions were beyond the scope of his employment, and made it so that Defendants had no reason to take precautions to keep P.K. away from church grounds or, at the very least, make

sure he was more closely supervised. Given these facts and circumstances, the moving Defendants cannot be held vicariously or directly liable to Plaintiffs for P.K.'s actions.

Accordingly, it is hereby

ORDERED that the motion by the Archdiocese and Archbishop Trakatellis is granted; and it is further

ORDERED that the motion by Holy Resurrection is granted; and it is further

ORDERED that all claims and cross-claims against Holy Resurrection Greek Orthodox Church of Brookville, the Greek Orthodox Archdiocese of America, and Archbishop Demetrios Trakatellis are severed and dismissed; and it is further

ORDERED that this action shall continue as against the remaining defendant; and it is further

ORDERED that counsel for the remaining parties are directed to appear for a status conference in Part 30 (60 Centre, Room 408) on April 13, 2020 at 10:00AM.

The Clerk of the Court is directed to mark his records and enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 2-24-20



SHERRY KLEIN HEITLER, J.S.C.